

No. 123990

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IN THE SUPREME COURT OF ILLINOIS

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ALEXIS NICHOLS, f/k/a Alexis Brueggeman,

*Plaintiffs-Appellee,*

vs.

DAVIS FAHRENKAMP and DAVID FAHRENKAMP, d/b/a  
Farhrenkamp Law Offices

*Defendants-Appellants.*

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On Appeal from the Appellate Court of Illinois  
Fifth Judicial District, No. 5-16-0316  
There heard on appeal from the Third Judicial Circuit,  
Madison County, Illinois, No. 13-L-1395.  
The Honorable Barbara L. Crowder, Judge Presiding.

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**ILLINOIS TRIAL LAWYERS ASSOCIATION'S  
AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES**

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### Introduction

This case presents a very narrow question – is an attorney serving as a minor’s guardian *ad litem* in the administration of the minor’s probate estate entitled to any immunity for his or her negligent representation.

Resolution of this question does not implicate the question of whether guardians *ad litem* involved in contested litigation are entitled to immunity. Those situations, *e.g.* child custody (*Vlastelica v. Brend*, 2011 IL App (1st) 102587), or the value of a minor’s or disabled person’s personal injury settlement where the parties disagree as to the value of the case (*Will v. Northwestern University*, 378 Ill.App.3d 280 (1st Dist. 2007)), raise different issues. Tempers flare in contested litigation, interests may conflict, and the litigants have their own counsel to represent the litigants’ interests. The record in this case is insufficient to address immunity in such cases. And there is no need to address it.

Probate estate administration, on the other hand, is typically not adversarial. In some cases, including the case at bar, the guardian *ad litem* is the only skilled individual representing the minor, and he or she should be held to the same standard as all other private attorneys, representing clients and getting paid for their work.

This *amicus* brief will primarily address the public policy considerations raised.

## Argument

### I.

**This Court should not grant negligent guardians *ad litem* immunity where the Legislature has not seen fit to do so.**

The Legislature has addressed the topic of guardians *ad litem* both in the Probate Act of 1975 and in the Marriage and Dissolution Act. In neither Act has the Legislature seen fit to grant guardians *ad litem* any immunity for their negligence. This Court should not step in and judicially decree that private attorneys, who are officers of the court, like all other attorneys, and non-attorney guardians *ad litem*, who are likewise paid for their work as guardians *ad litem*, are entitled to immunity.

The Probate Act establishes the parameters of a guardian *ad litem*'s duties, compensation and election as follows:

#### **755 ILCS 5/27-3 Duties of a guardian *ad litem***

A guardian *ad litem* appointed under this Act shall file an answer, appear and defend *on behalf of the ward* or person not in being whom he represents. (Emphasis added.)

#### **755 ILCS 5/27-4 Compensation of a guardian *ad litem* or special administrator**

A guardian *ad litem* or special administrator is entitled to such reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and paid in due course of administration.

**755 ILCS 5/27-5 Selection of guardian *ad litem* or special administrator**

The person appointed as guardian *ad litem* or special administrator under this Act may not be selected upon the recommendation of any person having an interest adverse to the person represented by the guardian *ad litem* or special administrator or by the attorney for the adverse party.

These provisions have been in effect since 1976 and the Legislature has not seen fit to amend them since then despite the fact that it has amended the Probate Act many times.

The Legislature also addressed the role of a guardian *ad litem* preliminary to hearings in Section 5/11a-10 of the Probate Act:

**755 ILCS 5/11a-10 Procedures preliminary to hearing.**

(a) Upon the filing of a petition pursuant to Section 11a-8 [755 ILCS 5/11a-8], the court shall set a date and place for hearing to take place within 30 days. The court shall appoint a guardian *ad litem* to report to the court concerning the respondent's best interests consistent with the provisions of this Section, except that the appointment of a guardian *ad litem* shall not be required when the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition. If the guardian *ad litem* is not a licensed attorney, he or she shall be qualified, by training or experience, to work with or advocate for persons with developmental disabilities, the mentally ill, persons with physical disabilities, the elderly, or persons with a disability due to mental deterioration, depending on the type of disability that is alleged in the petition. The court may allow the guardian *ad litem* reasonable compensation. The guardian *ad litem* may consult with a person who by training or experience is qualified to work with persons with a developmental disability, persons with mental illness, persons with physical disabilities, or persons with a disability due to mental deterioration, depending on the type of disability that is alleged. The guardian *ad litem* shall personally observe the

respondent prior to the hearing and shall inform him orally and in writing of the contents of the petition and of his rights under Section 11a-11 [755 ILCS 5/11a-11]. The guardian *ad litem* shall also attempt to elicit the respondent's position concerning the adjudication of disability, the proposed guardian, a proposed change in residential placement, changes in care that might result from the guardianship, and other areas of inquiry deemed appropriate by the court. Notwithstanding any provision in the Mental Health and Developmental Disabilities Confidentiality Act [740 ILCS 110/1] or any other law, a guardian *ad litem* shall have the right to inspect and copy any medical or mental health record of the respondent which the guardian *ad litem* deems necessary, provided that the information so disclosed shall not be utilized for any other purpose nor be redisclosed except in connection with the proceedings. At or before the hearing, the guardian *ad litem* shall file a written report detailing his or her observations of the respondent, the responses of the respondent to any of the inquiries detailed in this Section, the opinion of the guardian *ad litem* or other professionals with whom the guardian *ad litem* consulted concerning the appropriateness of guardianship, and any other material issue discovered by the guardian *ad litem*. The guardian *ad litem* shall appear at the hearing and testify as to any issues presented in his or her report.

This section was pertinently amended in 1995 by P.A. 89-396, effective August 20, 1995, and 2011 by P.A. 97-375, effective August 15, 2011. The Legislature did not address immunity at any time.

Never has the Legislature declared that guardians or guardians *ad litem* are entitled to immunity for their negligence.

At least equally important, the first statute cited, 755 ILCS 5/27-3, describing the duties of a guardian *ad litem*, should defeat Fahrenkamp's bold assertion that "[t]he Appellate Court's decision fundamentally alters the role of a guardian *ad litem*, treating Fahrenkamp as the ward's lawyer rather than as an arm

of the court.” (PLA at 8.) Under the clear and unambiguous words of the statute, a guardian *ad litem*, who need not even be a licensed attorney, “appear[s] and defend[s] *on behalf of the ward* or person not in being whom he represents.” Under the Probate Act, the guardian *ad litem* represents the minor and is not an arm of the court.

Separate and distinct from the Probate Act, the Legislature has addressed the duties of guardians *ad litem* in the Illinois Marriage and Dissolution Act. Nowhere in this Act, which likewise does not require a guardian *ad litem* to be a licensed attorney, has the Legislature declared that a guardian *ad litem* is entitled to any immunity for his or her misdeeds:

**750 ILCS 5/506 Representation of child.**

(a) Duties. In any proceedings involving the support, custody, visitation, allocation of parental responsibilities, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities to address the issues the court delineates:

(1) Attorney. The attorney shall provide independent legal counsel for the child and shall owe the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

(2) Guardian *ad litem*. The guardian *ad litem* shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties. The guardian *ad litem* may be called as a witness for purposes of cross-examination regarding the guardian *ad litem*'s report or recommendations. The

guardian *ad litem* shall investigate the facts of the case and interview the child and the parties.

(3) Child representative. The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, and encourage settlement and the use of alternative forms of dispute resolution. The child representative shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian *ad litem*. The child representative shall consider, but not be bound by, the expressed wishes of the child. A child representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child representative has been appointed. The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. The child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments. The child representative shall disclose the position as to what the child representative intends to advocate in a pre-trial memorandum that shall be served upon all counsel of record prior to the trial. The position disclosed in the pre-trial memorandum shall not be considered evidence. The court and the parties may consider the position of the child representative for purposes of a settlement conference.

(a-3) Additional appointments. During the proceedings the court may appoint an additional attorney to serve in the capacity described in subdivision (a)(1) or an additional attorney to serve in another of the capacities described in subdivision (a)(2) or (a)(3) on the court's own motion or that of a party only for good cause shown and when the reasons for the additional appointment are set forth in specific findings.

(a-5) Appointment considerations. In deciding whether to make an appointment of an attorney for the minor child, a guardian *ad litem*, or a child representative, the court shall consider the nature and

adequacy of the evidence to be presented by the parties and the availability of other methods of obtaining information, including social service organizations and evaluations by mental health professions, as well as resources for payment.

In no event is this Section intended to or designed to abrogate the decision making power of the trier of fact. Any appointment made under this Section is not intended to nor should it serve to place any appointed individual in the role of a surrogate judge.

(b) Fees and costs. The court shall enter an order as appropriate for costs, fees, and disbursements, including a retainer, when the attorney, guardian *ad litem*, or child's representative is appointed. Any person appointed under this Section shall file with the court within 90 days of his or her appointment, and every subsequent 90-day period thereafter during the course of his or her representation, a detailed invoice for services rendered with a copy being sent to each party. The court shall review the invoice submitted and approve the fees, if they are reasonable and necessary. Any order approving the fees shall require payment by either or both parents, by any other party or source, or from the marital estate or the child's separate estate. The court may not order payment by the Department of Healthcare and Family Services in cases in which the Department is providing child support enforcement services under Article X of the Illinois Public Aid Code. Unless otherwise ordered by the court at the time fees and costs are approved, all fees and costs payable to an attorney, guardian *ad litem*, or child representative under this Section are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523. The provisions of Sections 501 and 508 of this Act shall apply to fees and costs for attorneys appointed under this Section.

The Legislature re-wrote this statute in 2005. P.A. 94-640, effective January 1, 2006. The Legislature did not provide for immunity in this statute either.

Where the Legislature wants to provide for immunity for a lawyers's negligence it knows how to do so. For example, in Section 5 of the Public and

Appellate Defender Immunity Act (745 ILCS 19/5), the Legislature expressly provided for immunity for lawyers serving as public defenders:

No public defender, assistant public defender, appellate defender, or assistant appellate defender, acting within the scope of his or her employment or contract, nor any person or entity employing, supervising, assisting, or contracting for the services of a public defender, assistant public defender, appellate defender, or assistant appellate defender, is liable for any damages in tort, contract, or otherwise, in which the plaintiff seeks damages by reason of legal or professional malpractice, except for willful and wanton misconduct.

Simply stated, under these circumstances, where the Legislature has not given guardians *ad litem* immunity, there is no good reason for this Court to step in and act. *C.f. Nelson v. Artley*, 2015 IL 118058, ¶ 23 (“Where, as here, the legislature chooses not to amend a statute after a judicial construction, it will be presumed that the legislature acquiesced in the court’s statement of legislative intent.”). *See also, Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 50 (1998) (same); *Miller v. Lockett*, 98 Ill. 2d 478, 483 (1983) (same).

## II.

**The record in this case does not provide enough information for the Court to make a general decision on immunity for guardians *ad litem*.**

While it is true that the Illinois Appellate Court has decided that child representatives are entitled to immunity in various circumstances (*Vlastelica v. Brend*, 2011 IL App (1st) 102587), this is the only case that addresses whether immunity should be afforded to guardians *ad litem* in uncontested probate administration matters. The record in this case, however, is too limited to make a

well-considered decision as to whether such immunity should be accorded *generally* to guardians *ad litem*.

There is no information in the record regarding the criteria circuit court judges use for selecting guardians *ad litem*. It is silent as to the expertise and there is no showing as to how many guardians *ad litem* are not attorneys and/or the backgrounds of these individuals. The court does not know how often guardians *ad litem* serve *pro bono* and how often they get paid. It does not know if guardians *ad litem* typically carry malpractice insurance for their work as guardians *ad litem* or if circuit court judges require such insurance. Indeed, the court does not even know if malpractice insurance for probate and guardianship work covers work done as a guardian *ad litem*.

There is no record as to the general scope of a guardian *ad litem*'s work in probate administration. Is there a significant difference between being a guardian *ad litem* in a minor's estate administration matter versus being one in a custody dispute? Is there a significant difference between a guardian *ad litem* and a child representative? Should the same rules apply to guardians *ad litem* in child custody cases and probate administration? Should the same rules apply to guardians *ad litem* and child representatives?

If guardians *ad litem* have immunity, how can they be made accountable for their actions or inactions? Should they be accountable? Fahrenkamp thinks they need not be accountable. They argue that guardians *ad litem* should be treated like

judges so they won't be intimidated. (PLA at 9.) Perhaps the Legislature should investigate whether guardians *ad litem* are intimidated. There is no evidence of it in this record.

Fahrenkamp also assert that even if they have immunity, aggrieved minors may seek court removal or recourse from the Illinois Attorney Registration and Disciplinary Commission. (PLA at 15.) Fahrenkamp certainly hasn't provided the Court with any support for its assertion that these remedies would help a minor get relief from a negligent attorney.

The case at bar involves a relatively simple estate administration. The minor was not declared a disabled person when she reached adulthood. Is there a significant difference between a simple case like this one, or one where the minor receives settlement proceeds from the wrongful death of a parent versus a case involving a brain injured minor who will be disabled for life? Should that difference matter in determining immunity?

In sum, the issue of whether immunity should be afforded to guardians *ad litem* in probate administration matters is complex and this Court should not make a sweeping ruling regarding immunity in all cases involving guardians *ad litem* and child representatives when it does not have an adequate record to do so. *See e.g. Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 157 (2005) ("Without an adequate record preserving the claimed error, [we] must presume the circuit court

had a sufficient factual basis for its holding and that its order conforms with the law.”)

### III.

**If this Court were to decide that guardians *ad litem* were entitled to immunity, that decision should be prospective only.**

If this Court agrees with Fahrenkamp’s arguments and finds that the Appellate Court wrongly decided the issue, it should, at the very least, find that this cases represents a substantive change in Illinois law that impairs a plaintiff’s vested right to seek a remedy for Fahrenkamp’s negligence.

A reversal of the Appellate Court’s decision would changes the substantive law of legal malpractice. As such, if a lawyer is to be accorded immunity when acting as a guardian *ad litem*, the ruling it should only be applied prospectively, not to pending cases. It eliminates a plaintiff’s vested right to bring a claim against a negligent, private attorney.

Typically, the question of prospective or retroactive application of a change in the law arises when the Legislature amends a statute or creates a new statute. When the Legislature so acts, the rules of prospective or retroactive application are known and understood – if the law affects a substantive right it is only applied prospectively.

In *Caveny v. Bower*, 207 Ill.2d 82, 91-93 (2003), this Court re-stated the established rules regarding retroactive application of a new statute:

In *Commonwealth Edison [v. Will County Collector*, 196 Ill. 2d 27, 255 Ill. Dec. 482, 749 N.E.2d 964 (2001)], this court for the first time adopted the United States Supreme Court's retroactivity analysis, as set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). Under the *Landgraf* analysis, as adopted by this court, the first question is whether the legislature has clearly indicated the temporal reach of an amended statute. *Commonwealth Edison*, 196 Ill. 2d at 38. If so, then, absent a constitutional prohibition, that expression of legislative intent must be given effect. *Commonwealth Edison*, 196 Ill. 2d at 38. If not, then the court must determine whether applying the statute would have a retroactive impact, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Commonwealth Edison*, 196 Ill. 2d at 38. If there would be no retroactive impact, then the amended law may be applied retroactively. *Commonwealth Edison*, 196 Ill. 2d at 38. If there would be a retroactive impact, however, then the court must presume that the legislature did not intend that it be so applied. *Commonwealth Edison*, 196 Ill. 2d at 38.

*See also, First of America Trust Co. v. Armstead*, 171 Ill. 2d 282, 289, (1996)

(when an application of a change in the law would affect a vested right, that vested right is an interest that is protected from legislative interference by our due process clause (Ill. Const. 1970, art. I, § 2)).

If this Court grants immunity to guardians *ad litem*, it will be as if it is amending the Probate Act. Plaintiffs' rights would be impaired by application of the decision. If this Court is going to announce that guardians *ad litem* involved in the administration of minors' probate estates are entitled to immunity, it should not apply to cases that were pending before it was decided.

**CONCLUSION**

For all of the reasons stated above, The Illinois Trial Lawyers Association (“ITLA”), by its volunteer counsel, Leslie J. Rosen, asks this Court to affirm the judgment of the Appellate Court, Fifth Judicial District, in this important matter.

Respectfully submitted,

By:       /s/ Leslie J. Rosen      

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 13 pages.

/s/ Leslie J. Rosen